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IN THE

Supreme Court of the United States

October Term, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF

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A relatively short reply will serve to demonstrate the obvious infirmities of the Government's brief in this case.

I.

The Government on page 19 of its brief stated that this case *differs* from *Ferguson v. United States*, 307 F. 2d 787 (C. A. 10), certiorari granted, June 10, 1963, Docket No. 198 Oct. Term, 1963, in that "There the issue is whether *intrastate* telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court." This is incorrect. There were chiefly two relevant questions presented in the petition for certiorari, namely, does Oklahoma statute barring attachment of recorder to telephone extension prevent federal prosecutor's use of evidence obtained through such device; and does recording of telephone conversation by use of such device violate § 605 of Federal Communications Act.

This Court granted the petition for a writ of certiorari but did *not* limit the grant of certiorari to "whether intrastate telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court," as suggested by the Government in its brief.

The real difference between this case and *Ferguson, supra*, is that a greater variety of electronic devices were here used to surreptitiously gather evidence against the petitioner and his co-defendants.

II.

A. In *Benanti v. United States*, 355 U. S. 96, at page 106, footnote 19, this Court stated "Schwartz v. Texas, 344 U. S. 199, 97 L. ed. 231, 73 S. Ct. 232, *supra*, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was *satisfied that the action of the state officials nonetheless violated* § 605. 344 U. S. at 202." (Emphasis supplied.) Here the state police officer and Leonard, the prosecution witness, did to Palermo exactly what the state police officer and Jarrett did to Schwartz, in *Schwartz v. Texas, supra*. In *Schwartz v. Texas*, 344 U. S. 199, the Court was at pains to note (p. 201) that "the intercepted calls would be inadmissible in a federal court," and that "this is true even though the communications were intrastate telephone calls."

B. When Congress in § 605 said "no person" shall intercept and divulge it meant "no person". *Nardone v. United States*, 302 U. S. 379; *Nardone v. United States*, 308 U. S. 338; *Weiss v. United States*, 308 U. S. 321.

Rathbun v. United States, 355 U. S. 107, did not overrule the above cited cases and modify § 605 to read that *interception* and divulgence may be made by the auditor.

Both in space and time this interception was before the arrival of the communication to the auditor. The Government in its Brief in Opposition never denied that there was an interception and divulgence in this case.

Palermo's own recordings of telephone conversations between himself and Leonard (referred to in the Government's Brief, page 18) were legally made in November, 1959, *after* he was indicted on September 12, 1959, *only* to show that Leonard was demanding money (Defendants' Exhibits C, D and E) and were played *without objection* during the cross-examination of Leonard. The telephone recording used by the Government which was obtained by a police induction coil interception was *not* played during the cross-examination of Palermo but was saved to be offered as independent evidence in the Government's case in rebuttal over objections by indeed all the petitioners in this case.

The concession in *Rathbun* by the *parties* to *that* suit "that either party may *record* the conversation and publish it," 355 U. S., at 110 (emphasis added), contemplates a *legal* recording and not one made in violation of the law. Here, admittedly, the police, not the party, recorded the conversations by an illegal interception.

III.

A. In *Lopez v. United States*, 83 S. Ct. 1381, the evidence disclosed that Lopez knew he was talking to a government agent but he did not know that the conversations were being recorded. In this case, just as in *On Lee v. United States*, 343 U. S. 747, which we submit should be overruled, petitioner did not know that the police were recording his telephone conversations with Leonard, who was not a government agent.

The supervisory power of this Court is invoked, if necessary, to exclude from federal criminal trials the *use* of recordings surreptitiously obtained by electronic interceptions of "friendly" conversations to be played to the jury, who are told by the judge that the recordings are "expurgated" with the "obscenities left out" (66R. 7759), or to be used by government counsel in rebuttal or in their final argument to the jury.

Courts now will instruct the jury that they will have a technician available to play recordings to the jury (66R.

7703). Almost the last words the jury heard was the playing of the Palermo-Leonard telephone conversation (66R. 7760).

This new technique of recordings being the last words the jury hears, even after the court's charge, threatens to shift and undermine the entire trial practice as we now know it.

B. Petitioner has a standing to object to the various other electronic recordings involving co-conspirators whether they were indicted or unindicted. *Jones v. United States*, 362 U. S. 257.

IV.

Petitioner had in his petition, pages 9 and 10, argued that the trial judge should have instructed the jury, as requested, that if essential facts were not found the verdict must be "not guilty." The Government in its brief, at page 29, argues that this should have been brought to the trial court's attention by exceptions. *It was.* At the trial after the charge exceptions were taken (66R. 7713). See *Roberts v. United States*, 284 F. 2d 209 (D. C. Cir. 1960).

Indeed, the court below in its opinion (Petitioner's Appendix A, 44a, 45a) stated that because of the failure of the trial judge to inform counsel on their points for charge before argument that "the petitioners should not be foreclosed from asserting error in the charge."

Conclusion.

For the foregoing additional reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 1963.